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DPC Construction, Inc. and Mason Tenders District Council of Greater New York, Laborers' International Union of North America, AFL-CIO. Case 2-CA-32660

November 27, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

Upon a charge and an amended charge filed by the Charging Party on December 16, 1999, and January 7, 2000, respectively, against DPC Construction, Inc., the Respondent, the General Counsel of the National Labor Relations Board issued a complaint on August 8, 2000, alleging that the Respondent has violated Section 8(a)(1) and (3) of the National Labor Relations Act.¹ Although properly served copies of the charge, amended charge, and complaint, the Respondent failed to file an answer.²

On October 13, 2000, the General Counsel filed a Motion for Summary Judgment with the Board. On October 17, 2000, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by

¹ On May 19, 2000, the Regional Director for Region 2 approved an informal settlement agreement entered into by the parties concerning the allegations in the charge and amended charge. On August 8, 2000, the Regional Director issued an order revoking approval of the informal settlement agreement based on the Respondent's failure, despite requests from the Regional Office, to furnish any evidence of its compliance with the terms of the settlement agreement.

² The certified mail receipts for service of the complaint and the order revoking approval of the informal settlement agreement were not returned by the post office. However, neither the complaint nor the order was returned to the Regional Office. Further, the complaint was re-served on the Respondent by first class mail on September 22, 2000, and was not returned to the Regional Office. The failure of the Postal Service to return documents served by regular mail indicates actual receipt of those documents by the Respondent. *Lite Flight, Inc.*, 285 NLRB 649, 650 (1987).

letter dated September 5, 2000, notified the Respondent that unless an answer were received by September 15, 2000, a Motion for Summary Judgment would be filed.³

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a New York corporation with an office and place of business in Bayside, New York, has been engaged as a construction contractor.⁴ In the 12-month period preceding the issuance of the complaint, the Respondent purchased and received at its Bayside, New York facility goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors within the meaning of Section 2(11) of the Act and agents of the Respondent acting on its behalf:

David Ilchert	President/CEO
Anthony Rizzo	Project Coordinator
Antonio J. Moura	General Foreman
Richard (LNU)	Foreman/Supervisor

On or about December 10, 1999, at its construction site located at 387 to 391 Greenwich Street, New York, New York, the Respondent, acting through its foreman/supervisor, Richard (LNU), warned and informed employees that it did not hire union members, and that it would discharge any employee who was a member of the union.

On or about December 10, 1999, at its construction site located at 387 to 391 Greenwich Street, New York, New York, the Respondent, acting through its fore-

³ The letter was sent by both certified and regular mail. Although the certified letter was returned to the Regional Office marked "unclaimed," failure or refusal to accept service cannot defeat the purposes of the Act. See, e.g., *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986). As noted above, the failure of the Postal Service to return documents served by regular mail indicates actual receipt of those documents by the Respondent. *Lite Flight, Inc.*, supra. Furthermore, even if no further reminder or warning of the consequences of failing to file an answer were sent or given to the Respondent, this would not warrant denial of the motion. See, e.g., *Superior Industries*, 289 NLRB 834, 835 fn. 13 (1988).

⁴ By order dated November 1, 2000, the Regional Director amended the complaint to correct the description of the Respondent's business.

man/supervisor, Richard (LNU), discharged employee Hector Fuentes and failed to pay Hector Fuentes.

The Respondent engaged in this conduct because Hector Fuentes supported, joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by discharging employee Hector Fuentes, we shall order the Respondent to offer the discriminatee full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to expunge from its files any and all references to the unlawful discharge and failure to pay, and to notify the discriminatee in writing that this has been done.

ORDER

The National Labor Relations Board orders that the Respondent, DPC Construction, Bayside, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Warning and informing employees that it does not hire union members and that it will discharge any employee who is a member of the union.

(b) Discharging and failing to pay employees because of their union activities or affiliation or to discourage employees from engaging in those activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Hector Fuentes full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent

position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Hector Fuentes whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and failure to pay Hector Fuentes, and within 3 days thereafter, notify the employee in writing that this has been done and that the discharge and failure to pay will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Bayside, New York, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 10, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 27, 2000

John C. Truesdale, Chairman

Wilma B. Liebman, Member

Peter J. Hurtgen, Member

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT warn and inform employees that we do not hire union members and that we will discharge any employee who is a member of the union.

WE WILL NOT discharge or fail to pay employees because of their union activities or affiliation or to discourage employees from engaging in those activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Hector Fuentes full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Hector Fuentes whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful failure to pay and discharge of Hector Fuentes, and

WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge and failure to pay will not be used against him in any way.

DPC CONSTRUCTION, INC.